S.B. Civil Second Appeal No.300/2004
Pawan Kumar
vs.
Moolchand & Anr.

DATE OF ORDER : - 2.8.2005

HON'BLE MR. PRAKASH TATIA,J.

Mr.SC Maloo, for the appellant.
Mr.RR Nagori, for the respondents

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Heard learned counsel for the parties.

Learned counsel for the appellant submits that original suit was filed by the appellant and his mother Anchi Devi. The defendant is brother of appellant and son of Smt. Anchi Devi. The suit was filed for the relief of permanent injunction. The plaintiffs prayed that the defendant brother and son of the plaintiff, Moolchand be restrained from making any addition and alteration in the suit property. The case of the plaintiff was that the suit property was purchased by the plaintiff no.1 Smt. Anchi Devi mother of the plaintiff no.2 and defendant. However, the defendant took a plea that the property in dispute fell in the share of the defendant upon oral partition and the defendant is in possession of the property as owner after the partition.

It is admitted by both the counsels that in a suit for injunction no

finding could have been recorded about the nature of the property whether the property was ancestral property or was purchased from the income of the ancestral property or the property was partitioned or not because of the simple reason that no other descendant of Chandanmal and Anchi Devi were party in the suit and neither the plaintiff nor the defendant sought any relief of declaration of the nature of the property nor sought any relief of declaration that property has been partitioned.

In view of the above, if the finding about the nature of the property being ancestral or acquired property of Anchi Devi as recorded by the trial court and appellate court respectively remains, it may cause further dispute as none of the other descendant of deceased Chandanmal was party in the suit. The suit was filed only for the relief of injunction and no relief of possession was claimed in the suit. In these circumstances, the suit suffers from formal defect in its form, therefore, the appellant-plaintiff prays that appellant may be permitted to withdraw the suit so that he may file a proper suit to save his property. Learned counsel for the respondent no.1 contesting defendant also has no objection in view of the fact that the present suit was only a suit for injunction and, therefore, no title could have been decided by the two courts below .

In view of the above, the appellant is permitted to withdraw the

suit with liberty to file fresh suit and the suit of the plaintiff-appellant is dismissed as withdrawn with liberty to file fresh suit. Hence, the appeal of the appellant is dismissed as having become infructuous.

(Prakash Tatia), J.

c.p.goyal/-